89-616

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

BRIAN SCHOENFIELD,

Petitioner,

v.

COUNTY OF HUMBOLDT, TERRY FARMER, RODNEY LESTER, BARBARA ALLSWORTH, and SYLVIA DOUGLAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

This case, arising from dismissal of petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6), presents these issues:

1. Is a school teacher entitled to redress under 42 U.S.C. §1983 for stigmatization, career damage and attorneys' fees resulting from unsuccessful prosecution for child molestation which would not have occurred but for malicious acts of untrained state agents who conspired to destroy exculpatory evidence, to present false evidence, and otherwise to mislead the prosecutor about the strength of evidence against petitioner?

2. Should this Court resolve the conflict between the Ninth Circuit view, applied below, that the Constitution "does not protect an individual against

malicious prosecution" by state agents, and the contrary holdings of the Second, Third, Fifth, Sixth, Seventh and Tenth Circuits?

LIST OF PARTIES (RULE 21.1(b))

The parties to the proceedings below were the petitioner, plaintiff Brian Schoenfield, and the respondents, defendants County of Humboldt, Terry Farmer, Rodney Lester, Barbara Allsworth, and Sylvia Douglas.

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PETITION FOR WRIT OF CERTIORARI

This case presents the Court the opportunity to hold that innocent victims of the "dirty tricks" of state agents are as much entitled to protection of their civil rights as are convicted criminals, and to bring consistency to an area of law where the Ninth Circuit appears to be in conflict with much of the rest of the country.

Petitioner Brian Schoenfield respectfully prays that certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, upholding dismissal of his first amended complaint for failure to state a cause of action.

Opinion Below

The unpublished Memorandum of the Ninth Circuit Court of Appeals is reprinted in the Appendix[1/] [A 1-A 19].

Jurisdiction

Judgment of the Court of Appeal was entered May 22, 1989 [A 45]. On July 14, the Court of Appeals denied a timely Petition for Rehearing [A 47].

This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

Constitutional and Statutory Provisions Involved

United States Constitution, Fourteenth Amendment:

> ". . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdic-

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1/ Hereafter, "A".

> tion the equal protection of the laws."

42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

California Penal Code §§ 830.1 and 832 are set out at A 67.

STATEMENT OF THE CASE

Because the district court dismissed petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6), he is entitled for purposes of review to have the

Court treat all allegations of his complaint as true (Estelle v. Gamble, 429 U.S. 97, 99, 50 L.Ed.2d 785, 97 S.Ct. 285 (1976)), and to have the complaint interpreted in the most favorable light (Brower v. County of Inyo, ___ U.S. ___, 103 L.Ed.2d 628, 109 S.Ct. 1378 (1989)). Thus, facts are stated in the manner they were alleged in petitioner's first amended complaint, which is reproduced in the Appendix [A 49-A 66].

Facts

Petitioner's career as a teacher, and his reputation, were irreparably damaged, and he was forced to spend $90,000 in attorney's fees to defend himself in a child molestation prosecution which would not have been pursued but for respondents' malicious and grossly negligent

actions [A 57, A 59-A 61, A 63]. Respondents were:

-- Volunteer Douglas and victim advocate Allsworth, untrained individuals acting on behalf of the prosecutor, who "understood that their assignment as investigators was 'to get'" petitioner [A 54-A 55];

-- Deputy Sheriff Lester, who conspired with Allsworth and Douglas to destroy exculpatory tape recordings, to interview witnesses in a biased and suggestive manner, to misrepresent evidence[2/], and to give the district attorney information

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2/ For example, Allsworth and Douglas told the district attorney the children said plaintiff fondled their breasts and pubic areas, when they merely reported he patted knees or shoulders [A 56].

they knew to be false [A 53, A 55-A 57];

-- District Attorney Farmer, who was aware of the other respondents' malicious attitude toward petitioner [A 55]; and

-- Humboldt County, which had a policy of not properly training sheriff's deputies and investigators, in violation of California law[3/] [A 57-A 60].

Fortunately, petitioner was found not guilty [A 57], but the very fact of being criminally prosecuted for child molestation irreparably harmed his reputation and career, and cost him $90,000 in

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[3/] California Penal Code Sections 830.1 and 832, set forth at [A 67], required sheriff's deputies and district attorney's investigators to complete a prescribed course of training.

otherwise unnecessary attorney's fees [A 58-A 60].

The District Court's Dismissal

Petitioner sued for violation of his rights to due process and equal protection under 42 U.S.C. §1983, invoking the district court's federal question and civil rights jurisdiction (28 U.S.C. §§1331, 1343). His complaint also alleged two state law causes of action under the doctrine of pendent jurisdiction.

On respondents' Rule 12(b)(6) motion, the district court dismissed with leave to amend, holding that petitioner's allegations were too "conclusory" [A 30-A 31], that the complaint failed to allege a deprivation of liberty or property and did not "implicate any constitutionally protected interest" [A 32] nor allege

"outrageous conduct which falls under a specific constitutional prohibition" [A 36], that respondent Humboldt County could not be held vicariously liable for its employees' acts [A 39-A 40], and that the other respondents were all immune from liability [A 41-A 43].

Petitioner amended his complaint [A 49-A 66], but the district court dismissed with prejudice:

> "Plaintiff's additional allegations of possible bias on the part of investigators and unsubstantiated charges of destruction of evidence also fail to meet the threshold requirements of either a procedural or substantive due process claim. As explained in the [original dismissal order], plaintiff got the process he was due -- an acquittal" [A 22, emphasis added].

The court treated respondents' conduct as involving negligence only [A 21-A 22], saying their "intent was never to deprive plaintiff of 'property' in the constitu-

tional sense. The loss of employment opportunity was rather a result of the criminal conviction [sic]" [A 23].[4/]

The Court of Appeals' Decision

On appeal, the Ninth Circuit panel held that "[m]alicious prosecution does not constitute a civil rights violation in the absence of a violation of the Equal Protection Clause or some other specific constitutional safeguard" [A 8], unless the victim is denied bail or convicted as a result [A 9-A 10]. The Court acknowledged the contrary view of the

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[4/] Plaintiff had also alleged a cause of action for violation of 42 U.S.C. §1985 for conspiracy to deprive the class of persons accused of child molestation of equal protection [A 61-A 62], which the district court likewise rejected [A 24].

Fifth Circuit[5] [A 11], and commented that it is "perhaps surprising that the federal Constitution does not protect an individual against malicious prosecution" [A 12], but nevertheless affirmed dismissal [A 19].[6]

REASONS FOR GRANTING CERTIORARI

According to the opinion below, the Court of Appeals' "most important" reason for affirming was that petitioner

> ". . . was acquitted. Thus, the only deprivation Schoenfield suffered is of the type that would natur-

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[5] But not those of the several other federal circuits, discussed at pages 15-18 below, which do recognize that malicious prosecutions by agents of the state do violate civil rights.

[6] The opinion below did not reach the issue of immunity, vel non, and that subject is therefore not addressed here, although petitioner's briefs below clearly established that there is no basis for finding either the individual respondents or the County immune.

ally occur when someone is prosecuted for an infamous crime." [A 10].

The difference between the circumstances alleged, however, and the cases the panel might have had in mind is that there was nothing "natural" about this prosecution. There might perhaps have been an investigation, but -- and this fact must be accepted as true for purposes of a Rule 12(b)(6) dismissal -- the district attorney would not have tried petitioner if respondents Allsworth, Douglas and Lester had not handled the investigation and manipulated the evidence in bad faith.

I.

INNOCENT VICTIMS OF LAW ENFORCEMENT WRONGDOING ARE ESPECIALLY ENTITLED TO REDRESS FOR ITS HARMFUL EFFECTS.

To see that this case falls into the class of conduct prohibited by substantive due process regardless of the procedure the state uses to implement it, one need only ask the rhetorical question:

> May law enforcement authorities ever deliberately destroy or suppress evidence which would tend to exculpate an accused citizen, fail to record exculpatory evidence, or knowingly present a prosecutor with false testimony?

Petitioner can imagine no circumstance in which the United States Constitution would sanction such conduct.

The Ninth Circuit itself has recognized that one has a property interest in

continued employment when he has a reasonable expectation or a legitimate claim of entitlement to it (Roley v. Pierce County Fire Protection Dist. No. 4, 869 F.2d 491, 494 (9th Cir. 1989)). There is nothing in the complaint to suggest that petitioner did not have a reasonable expectation of continuing his employment as a student teacher, but for the wrongful prosecution.

Further, it is well established that a citizen is deprived of liberty when the state damages his standing and associations in the community, and his ability to pursue other employment opportunities, by making unfounded charges which attach a "stigma of moral turpitude" (Id. at 495 [6]; see, Buxton v. City of Plant City, Florida, 871 F.2d 1037, 1047 (11th Cir. 1989)).

By the reasoning advanced below, only criminals could have redress for violation of civil rights, a notion which would judicially ratify the much-heard accusation that courts use the Bill of Rights to protect only the guilty. Innocent victims of investigative and prosecutorial wrongdoing would be relegated to knowing that virtue is its own and only reward; if the state pumped an accused's stomach to obtain evidence, or blackmailed a family member, there would be no federal sanction, so long as no conviction resulted.

Acquittal was gratifying to petitioner, of course, but it does nothing to restore his teaching career nor to reimburse the unnecessary $90,000 needed for the lawyers whose efforts produced that not guilty verdict.

"A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees . . ."

Owen v. City of Independence, Mo. (1980) 445 U.S. 622, 651, 63 L.Ed.2d 673, 100 S.Ct. 1398.

Certiorari is necessary to establish that this component is as vital in the malicious prosecution context as in all other aspects of American law.

II.

THE DECISION BELOW CONFLICTS WITH THE VIEWS OF SEVEN OTHER FEDERAL CIRCUITS.

While the memorandum acknowledges conflict with the Fifth Circuit on the question of constitutional right to be free from prosecution without probable cause [A 11], that is not the extent of

inter-circuit disagreement.

The Second Circuit says "[t]here can be no question that malicious prosecution can form the basis for imposition of liability under section 1983" (White v. Frank, 855 F.2d 956, 961, fn. 5 (2nd Cir. 1980).

The Fifth Circuit has explicitly held that "There is a constitutional right to be free of 'bad faith prosecution'" and that "simply obtaining an indictment is not enough to insulate state actors from an action for malicious prosecution under §1983" when the finding of probable cause "remained tainted by the malicious action of government officials" (Hand v. Gary, 838 F.2d 1420, 1424 and 1426 (5th Cir. 1986)). The Third Circuit finds it "clear that the filing of charges without probable cause and for reas-

ons of personal animosity is actionable under §1983" (Losch v. Borough of Parkesburg, Pa., 736 F.2d 903, 907 [2] (3rd Cir. 1984)).

The Sixth and Tenth Circuits, meanwhile, acknowledge that "'an egregious abuse of governmental power' may be sufficient to state a claim based on the violation of substantive due process" (Cale v. Johnson, 861 F.2d 943, 949 (6th Cir. 1988); see also, Lusby v. T. G. & Y. Stores, Inc., 749 F.2d 1423, 1431 [4] (10th Cir. 1984), reaffirmed 796 F.2d 1307 (1986)).

The Seventh Circuit is even more explicitly in conflict with the decision below. It has imposed §1983 liability on officers who "systematically concealed from the prosecutors, and misrepresented to them, facts highly material to -- that

is, facts likely to influence -- the decision whether to prosecute [the plaintiff] and whether to continue prosecuting him right up to and into the trial" (Jones v. City of Chicago, 856 F.2d 985, 993 (7th Cir. 1988)).

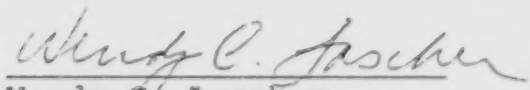
> "If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials they have defrauded."
>
> 856 F.2d at 994 (emphasis added).

This Court's action is needed to bring the views of the Ninth Circuit into harmony with those so unmistakable -- and unmistakably correct -- in the rest of the country.

CONCLUSION

For all the reasons seen above, this Court should grant certiorari to make clear throughout the United States that innocent citizens deserve protection against the malicious and grossly negligent actions of state agents who attempt to manipulate the criminal justice system. After briefing and argument, the judgment of the Court of Appeals should be reversed and petitioner should thereupon be permitted an opportunity to go to trial.

Respectfully submitted,



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U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN SCHOENFIELD,	)	
	)	
Plaintiff-Appellant,	)	NO. 88-1853
	)	
v.	)	DC No.
	)	CV-87-244-MHP
THE COUNTY OF HUMBOLDT;	)	
TERRY FARMER, RODNEY	)	
LESTER; BARBARA	)	MEMORANDUM*
ALLSWORTH; SYLVIA	)	
DOUGLAS,	)	
	)	
Defendant-Appellee.	)	
	)	

Appeal from the
United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge,
Presiding

Argued and Submitted March 16,1989
San Francisco, California

Before: POOLE, BOOCHEVER, and WIGGINS,
Circuit Judges.

BACKGROUND

Brian Schoenfield appeals the dismissal of his complaint for failure to state a claim. Thus, the following statement of facts assumes the allegations in the complaint are true.

Schoenfield was a student teacher for a fifth grade class when some female students claimed he had molested them. Rodney Lester, a Humboldt County Deputy Sheriff who had no training, skill or experience in investigating child molestation, commenced an investigation. He referred the investigation to the Humboldt County District Attorney, Terry Farmer.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Farmer was the Humboldt County employee reponsible for determining who would investigate a case, and how much training and experience they should have. Farmer assigned the investigation of the case to Barbara Allsworth and Sylvia Douglas. When Farmer made this assignment, he knew that Allsworth and Douglas had no training or experience in investigating criminal cases, that Allsworth had been assigned as a child advocate for the children who made the claims, and that Allsworth and Douglas were prejudiced against people accused of child molestation. Farmer acted with gross negligence, reckless disregard and deliberate indifference to the consequences of his action. Allsworth and Douglas understood that their assignment was "to get" Schoenfield.

Lester, Allsworth and Douglas conspired to investigate the claims improperly. They destroyed and suppressed exculpatory evidence, failed to record exculpatory testimony, and conducted interviews of witnesses in a biased and suggestive manner. They advised the District Attorney's office of the merits of the case in an improper and inadequate way. For example, they claimed that the children had described fondling of their pubic areas and breasts when the children had said Schoenfield had merely patted their knees or shoulders. In presenting the evidence to the District Attorney they omitted exculpatory evidence and drafted misleading and biased synopses of the testimony obtained.

As a result of these activities Schoenfield was criminally prosecuted.

Schoenfield was required to expend $90,000 to defend himself and he has been irreparably impaired in his ability to pursue his career as a teacher. He was acquitted.

Schoenfield filed a complaint against the County of Humboldt, Terry Farmer, Rodney Lester, Barbara Allsworth and Sylvia Douglas seeking damages under 42 U.S.C. section 1983 for the deprivation of his right to due process under the fourteenth amendment. The complaint also alleged that the court had pendent jurisdiction over his state law claims. Judge Patel dismissed this complaint with leave to amend, holding that Schoenfield failed to state a claim on which relief could be granted.

Schoenfield filed an amended complaint seeking damages under 42 U.S.C.

section 1983 for the violation of his rights to procedural and substantive due process under the fourteenth amendment. He also sought damages under 42 U.S.C. section 1985(2) for an alleged conspiracy to impede the due course of justice with the intent to deny him equal protection of the laws and injure him in his property. In addition he alleged that the court had pendent jurisdiction over his state law claims.

Judge Patel dismissed the complaint with prejudice. She held that Schoenfield had failed to state a claim under section 1983 because his allegations did not show a substantive or procedural due process violation, and he failed to state a claim under section 1985(2) because he had not alleged the required "class-based animus."

DISCUSSION

A dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed de novo. Bergquist v. County of Cochise, 806 F.2d 1364, 1367 (9th Cir. 1986), disapproved on other grounds, Canton v. Harris, 109 S.Ct. 1197. Dismissal is appropriate only if the plaintiff "'can prove no set of facts in support of his claim which would entitle him to relief.'" Id. (quoting Gibson v. United States, 781 F.2d 1334, 1337 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987)).

THE SECTION 1983 CLAIM

"The first inquiry in any § 1983 suit . . . is whether the plaintiff has

been deprived of a right 'secured by the Constitution and laws.'" Baker v. McCollan, 443 U.S. 137, 140 (1979) (quoting 42 U.S.C. § 1983). Schoenfield contends that he was denied due process because he would not have been prosecuted if the investigators had not presented false and incomplete evidence to the District Attorney who made the decision to prosecute. The prosecution resulted in the expenditure of money in defense of the action and impaired Schoenfield in his career as a teacher by stigmatizing him.

Malicious prosecution does not constitute a civil rights violation in the absence of a violation of the Equal Protection Clause or some other specific constitutional safeguard. Paskaly v. Seale, 506 F.2d 1209, 1212-13 (9th Cir.

1974); see Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc); contra Wheeler v. Cosden Oil & Chemical, 734 F.2d 254, 257-60 (5th Cir.), modified on other grounds, 744 F.2d 1131 (1984). The Ninth Circuit is in accord with most other circuits on this issue. See Annotation, Actionability of Malicious Prosecution Under 42 USCS § 1983, 79 A.L.R. Fed. 896, 902-03 (1986). We have held, however, that an individual who was denied bail in an unrelated criminal proceeding as a result of the malicious prosecution had properly stated a claim under section 1983, see Bretz, 773 F.2d at 1030-31, and that an individual who was convicted as a result of the malicious prosecution had properly stated a claim under section 1983, see Cline v. Brusett, 661 F.2d 108, 112 (9th Cir.

1981).

In this case, however, no such deprivation occurred. Schoenfield does not allege that he was arrested or detained without probable cause, or that the prosecution was based on a recognized invidious classification. Nor does he allege that any evidence was obtained in violation of his fourth amendment rights, or that the defendant's conduct deprived him of a fair trial. Most important, he was acquitted. Thus, the only deprivation Schoenfield suffered is of the type that would naturally occur when someone is prosecuted for an infamous crime.

Schoenfield's defense costs are harms of the type that would be incurred in any prosecution, and are not a cognizable deprivation of property for due process purposes. The harm to his career

that resulted from the stigma of being accused of child molestation is not a cognizable deprivation of liberty or property for due process purposes. See Paul v. Davis, 424 U.S. 693, 701-12 (1976). Because no deprivation of a federally protected right occurred, Schoenfield's remedy, if any, must be in state court. Cf. Baker, 443 U.S. at 146 (remedy for false imprisonment by state officials must be in state court).

The Fifth Circuit has held that an individual has a constitutional right to be free from prosecution without probable cause. See Wheeler, 734 F.2d at 258-60. The Fifth Circuit acknowledged in that opinion that its holding was inconsistent with the Ninth Circuit rule. See id. at 260 n.14. The Ninth Circuit view is supported by Gerstein v. Pugh, 420 U.S. 103

(1975). In Gerstein the Court held that if there are significant pretrial restraints on a defendant's liberty other than the condition that the defendant appear for trial, the defendant is entitled to a probable cause determination before a judicial officer. Id. at 125. The Court said: "In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute." Id. at 118-19.

Although it is perhaps surprising that the federal Constitution does not protect an individual against malicious prosecution, that is clearly the law in this circuit.

THE SECTION 1985(2) CLAIM

Schoenfield seeks damages under the second clause of section 1985(2), alleging that the defendants conspired to impede the due course of justice with the intent to deprive him of the equal protection of the laws. He alleges that the defendants' actions were motivated by an animus against individuals in the class of people accused of child molestation.

An action under the second clause of section 1985(2) requires the same showing as an action under the first clause of section 1985(3): "'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" Bretz, 773 F.2d at 1029 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)). "[W]e require

either that the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection." Schultz v. Sundberg, 759 F.2d 714, 718 (9th Cir. 1985) (citing DeSantis v. Pacific Telephone & Telegraph, 608 F.2d 327, 338 (9th Cir. 1979)).

In Bretz, an en banc panel of this court held that the plaintiff had failed to state a claim under section 1985 because he did not allege that the conspiracy was based on his membership in any class. In so holding, the opinion stated "Bretz does not, moreover, allege that he is a member of a class (e.g., state convicts) which suffers from invidious discrimination. Even construing his

complaint liberally, we cannot find an allegation of racial or class-based discrimination." 773 F.2d at 1028. Schoenfield seizes on the state convicts example and argues that it supports his claim that the class of people accused of child molestation is a sufficient class.

The defendants respond by citing Gibson v. United States, 781 F.2d 1334, 1341 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987). In that case (decided after Bretz) the Ninth Circuit said the Supreme Court "explicitly restricted the statutory coverage to conspiracies motivated by racial bias." Id. (citing United Brotherhood of Carpenters and Joiners of America, Local 610 AFL-CIO v. Scott, 463 U.S. 825, 834-35 (1983)). Schoenfield correctly points out that Gibson's reading of that case may be

overbroad. In United Brotherhood the Supreme Court expressly refrained from deciding whether or not any classification other than a racial one would qualify under section 1985(3). See 463 U.S. at 836-37. The Court held only that section 1985(3) was not intended to reach "conspiracies motivated by bias towards others on account of their economic views, status, or activities." Id. (emphasis in original). For this reason, Schoenfield asks this panel to reconsider Gibson.

Even if this panel were at liberty to reconsider Gibson, however, it would not be necessary in this case. Under the law that predated Bretz Schoenfield's "class" does not qualify as an invidious classification under section 1985. See Sundberg, 759 F.2d at 718 (citing

DeSantis, 608 F.2d at 338). The en banc panel in Bretz did not refer to this case law, and it is clear that it did not intend to hold that "state convicts" might be a sufficient classification for a claim under clause two of section 1985(2) or clause one of section 1985(3). There was no issue in Bretz about what type of classification satisfies the requirement of an invidious classification under Griffin. A holding that "state convicts" might be such a class would expand these provisions far beyond their application in any case of which we are aware.

Since the class of people accused of child molestation is not one which has been recognized as needing special protection, Schoenfield has not alleged the kind of class-based animus needed to state a claim under clause two of section

1985. Thus, this claim was properly dismissed.

ATTORNEY'S FEES

The defendants have requested attorney's fees. A defendant in a civil rights action should be awarded fees "'not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.'" Mayer v. Wedgewood Neighborhood Coalition, 707 F.2d 1020, 1021 (9th Cir. 1983) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)). Although Schoenfield's claim is foreclosed by Ninth Circuit law, it is not frivolous.

The theory that an individual is en-

titled to be free from prosecution without probable cause has been accepted by the Fifth Circuit. The Supreme Court or an en banc panel of the Ninth Circuit could conceivably agree with Schoenfield's claim. Thus, the defendants are not entitled to an award of attorney's fees in this case.

CONCLUSION

We AFFIRM the dismissal of the federal claims. The judgment should reflect that only the federal claims are dismissed with prejudice. The state law claims were dismissed because of the dismissal of the federal claims. The trial court erred in dismissing the state law claims with prejudice. We REMAND for an appropriate amendment of the judgment.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRIAN SCHOENFIELD, Plaintiff, -vs.- COUNTY OF HUMBOLDT, et al., Defendants.	NO. CV-87-244-MHP ORDER

This case arises out of the criminal prosecution of plaintiff Schoenfield for child molestation. Plaintiff's initial complaint was dismissed by this court

with leave to amend because of his failure to allege facts supporting an action under 42 U.S.C. § 1983. Although the amended complaint includes additional factual allegations, plaintiff has still failed to implicate a constitutionally protected interest. This court's earlier analysis holds: plaintiff's allegations remain both conclusory and unsupported by factual details and the activities alleged fail to reach the threshold abuse of power required for constitutional protection. For a more detailed discussion of these issues, see this court's previous Order of September 23, 1987.

The issue of defendants' immunity need not be reached because the complaint on its face fails to state a constitutional claim. The liability of a defendant under section 1983 for negligent

acts was resolved by the Supreme Court in Daniels v. Williams, 474 U.S. 327 (1986). In Daniels the Court held that the due process clause of the fourteenth amendment is not implicated by a state official's negligent act causing an unintended loss of or injury to life, liberty, or property. The due process clause applies only to "deliberate decisions of government officials to deprive a person of life, liberty or property." Id. at 331. Plaintiff's additional allegations of possible bias on the part of investigators and unsubstantiated charges of destruction of evidence also fail to meet the threshold requirements of either a procedural or substantive due process claim. As explained in the Order of September 23, plaintiff got the process he was due--an acquittal.

His allegations of conduct leading up to the acquittal do not rise to the level of a procedural due process claim, nor are the allegations of substantive due process violations sufficient to meet the standards required. See Order of Sept. 23, 1987 at 4-7. The new allegations add little to the first deficient complaint. It is insufficient for the same reasons stated in this court's earlier Order. See id.

Further, the defendants' intent was never to deprive plaintiff of "property" in the constitutional sense. The loss of employment opportunity was rather a result of the criminal conviction. Thus, allegations that defendants' conduct deprived plaintiff of procedural or substantive due process through gross negligence do not meet the requirements for a

claim under section 1983.

Plaintiff also includes a claim under 42 U.S.C. § 1985(2). This claim also fails to meet the statutory requirements. The Ninth Circuit in Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985), has held that "an allegation of class-based animus is an essential requirement of a claim under the second clause of § 1985(2)." Id. at 1029. Plaintiff's failure to allege racial or other class-based discrimination means his claim under section 1985(2) must be dismissed.

Accordingly, for the reasons stated above and explained in the Order of September 23, 1987, the court grants defendants' motion to dismiss the complaint with prejudice.

IT IS SO ORDERED.

Dated: FEB 12 1988

/S/
MARILYN HALL PATEL
United States District
Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRIAN SCHOENFIELD, Plaintiff, v. COUNTY OF HUMBOLDT, et al., Defendants.	NO. C-87-0244-MHP MEMORANDUM DECISION AND ORDER

This case arises out of the criminal prosecution of plaintiff Schoenfield for child molestation. After plaintiff was acquitted, he filed a complaint under 42 U.S.C. § 1983 against the County of Humboldt, its district attorney and two employees of the County district attor-

ney's office for wrongful prosecution in violation of his constitutional rights. Defendants filed a motion to dismiss claiming that (1) plaintiff's prosecution resulted from a proper exercise of prosecutorial discretion, and thus, does not state a colorable claim under § 1983 and (2) assuming arguendo plaintiff states a colorable claim, the suit is barred because defendants have an absolute or qualified immunity. In reply, plaintiff contends that (1) defendants mishandled the criminal charges against him by assigning the investigation to untrained personnel; (2) it was foreseeable that such an assignment would violate plaintiff's constitutional right to due process; and (3) defendants are not immune from liability for their acts which were performed in an administrative and not

prosecutorial capacity. Plaintiff seeks exemplary damages, costs and attorneys' fees. Having carefully considered all of the papers submitted by plaintiff and defendants, this court grants defendants' motion to dismiss with leave to amend within thirty (30) days of this order.

STATEMENT OF FACTS

Plaintiff was a student teacher for a fifth grade elementary school class from October 1984 through December 1984. In December 1984, a number of girls in Schoenfield's class claimed he had molested them. An investigation was commenced by defendant Lester who referred the case to the Humboldt County District Attorney's Office. Defendant Farmer assigned the case to defendants Allsworth

and Douglas.

Plaintiff alleges that Lester had neither the training, skill, nor experience to properly conduct an investigation of a child molestation case. Plaintiff also alleges that Farmer knowingly assigned untrained and biased personnel, i.e., Allsworth and Douglas, to investigate the claims against plaintiff and that during the investigation, Allsworth and Douglas destroyed and suppressed exculpatory evidence, failed to record exculpatory testimony, and coerced witnesses into giving false testimony.

DISCUSSION

I. Viability of Plaintiff's Section 1983 Claim

Section 1983, first enacted in 1871,

was intended to provide a remedy to persons subjected to "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law...." United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043 (1941). To determine whether a person was subjected to the misuse of power by state actors and has stated a colorable claim under § 1983, the court must make the following inquiry: (1) whether defendants acted under color of law, and (2) whether defendants' actions deprived plaintiff of a right, privilege, or immunity secured by the United States Constitution. Baker v. McCollan, 443 U.S. 137, 140 (1979). In accordance with section 1983, plaintiff has properly sued state actors. However, plaintiff has

made only conclusory allegations that defendants violated plaintiff's constitutional right to due process. Such "conclusory allegations, unsupported by any underlying factual details, [are] insufficient to state a claim for relief under 42 U.S.C. § 1983. Finley v. Rittenhouse, 416 F.2d 1186, 1187 (9th Cir. 1969). In fact, plaintiff fails to state whether he is alleging a procedural or substantive due process claim.

A. Adequacy of A Procedural Claim

A procedural due process claim under section 1983 does not exist for a random, unauthorized deprivation of liberty or property where adequate post deprivation procedures are available under state law. Parratt v. Taylor, 451 U.S. 527 543-44 (1981). Plaintiff's complaint may be

construed to state a procedural due process claim in that he contends the prosecution procedure was wrongful. However, the complaint fails to allege a deprivation of liberty or property. Moreover, plaintiff can properly state his claim for wrongful prosecution in state court. "The general rule is that malicious prosecution does not constitute a deprivation of life, liberty or property without due process of law and, therefore, is not cognizable under 42 U.S.C. § 1983." (Cline v. Brusett, 661 F.2d 108, 112 (9th Cir. 1981)).

Plaintiff's allegations cannot be construed to implicate any constitutionally protected interests. At most, they amount to a state claim for malicious prosecution, and thus, are insufficient to defeat a motion to dismiss.

Plaintiff cites Henderson v. Fisher, 631 F.2d 1115 (3rd Cir. 1980), Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965), and In Re Scott County Master Docket, 618 F. Supp. 1534 (D. Minn. 1985), in support of his claim that defendants' conduct denied him due process. Henderson is inapposite because it concerns an alleged due process violation arising out of plaintiff's conviction for sexual assault. Robichaud is distinguishable in that defendants in that case allegedly deprived the minor plaintiff of counsel, arrested her without probable cause, incarcerated her with adult prisoners, and attempted to intimidate plaintiff into confessing crimes in violation of her fifth, sixth, eighth, and fourteenth amendment rights. Schoenfield, unlike Robichaud, does not allege defendants

denied him counsel, arrested him without probable cause, or unlawfully detained or interrogated him.

In Re Scott County, which is factually similar to this case, was reversed, sub nom., by Meyers v. Morris, 810 F. 2d 1437 (8th Cir. 1987), and therefore, does not support plaintiff's case.

In sum, section 1983 imposes liability for violations of rights protected by the United States Constitution, not for violations of duties of care arising out of tort law. Baker, 443 U.S. at 146. At most, Schoenfield's claims might amount to malicious prosecution redressable in state court and but not under section 1983.

B. Adequacy of A Substantive Due Process Claim

The court in Garcia v. County of Los Angeles, 588 F. Supp. 700 (C.D. Cal. 1984) (disagreed with on other grounds, Shaw v. California Dept. of Alcoholic Beverage Control, 788 F.2d 600 (9th Cir. 1986)) (citing Schiller v. Strangis, 540 F. Supp. 605, 614 (D. Mass. 1982) defined a substantive as distinguished from a procedural due process claim as "a claim [where] the state's conduct is inherently impermissible." Id. at 708. The court further explained that a substantive due process claim "represents a difficult-to-define protection from particularly outrageous official conduct which falls under no other specific constitutional protection. It is based upon 'the right

to be free from state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning and harmful as literally to shock the conscience of the court...." 588 F. Supp. at 705. (quoting Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980)). The Garcia court held that the plaintiffs' due process claim was substantive in nature because plaintiffs alleged that police arrested plaintiffs at night without a warrant or probable cause and then severely beat them. Although Schoenfield alleges arguably outrageous conduct on the part of defendants Allsworth and Douglas in destroying exculpatory evidence, unlike the plaintiffs in Garcia, he has not alleged outrageous conduct which falls under a specific constitutional prohibition.

Plaintiff suggests that the failure to train defendants makes his claim actionable under section 1983. However, in making this argument, plaintiff misconstrues this court's holding in Bynum v. City of Pittsburg, 622 F. Supp. 196 (N.D. Cal. 1985). In Bynum, this court held that plaintiffs' allegation that the police officer's shooting of plaintiff was racially motivated amounted to a substantive due process claim. This court further stated that plaintiff's allegations that the police department had an ongoing policy of inadequate training and encouraging the abuse of people of color were sufficient to defeat a motion to dismiss because they supplied the causal connection between the defendants' policy and the constitutional deprivation of plaintiff's son's life. Unlike the

plaintiff in Bynum, Schoenfield fails to state an underlying substantive due process violation. The Constitution does not guarantee that only the guilty will be prosecuted, nor does it guarantee that a person who is prosecuted has a right to be investigated by adequately trained personnel. Characterizing defendants' conduct as depriving plaintiff of due process and alleging inadequately trained prosecutorial staff who destroyed exculpatory evidence does not constitute a colorable claim under section 1983.

In sum, plaintiff has failed to allege facts supporting a substantive due process claim, and thus, does not have a colorable claim under section 1983.

II. Immunity

Assuming arguendo that plaintiff has a colorable claim under section 1983, the suit is barred as to the named defendants because they are immune from liability.

A. Defendant Humboldt County

The United States Supreme Court in Monell v. Department of Social Services, 436 U.S. 658 (1978) held that municipalities are "persons" within the meaning of section 1983. In a footnote, the Court extended its holding to counties. Id. at 690 n.55. Yet, the Court made it clear that "a municipality [or county] cannot be held liable solely because it employs a torfeasor -- or, in other

words, a municipality [or county] cannot be held liable under § 1983 on a respondeat superior theory." Id. at 691 (emphasis in original).

Plaintiff cites Owens v. Haas, 601 F.2d 1242, 1246-47 (2d Cir. 1979), cert. denied, 444 U.S. 980 (1979), for the broad proposition that a city or county can be liable for the grossly inadequate training and supervising of its police force. However, the court in Owens, held that the city and county were not immune from liability because correctional officers severely beat and injured a prisoner in violation of his civil rights. Unlike Owens, Schoenfield fails to allege such an outrageous civil rights violation; his only theory for holding Humboldt County liable is respondeat superior, and thus, his complaint as to

Humboldt County is dismissed.

B. Defendants Prosecutor Terry Farmer and Staff Allsworth and Douglas

The leading case on the scope of prosecutorial immunity is Imbler v. Pachtman, 424 U.S. 409 (1976). The general rule is that prosecutors are absolutely immune from damage suits with respect to their quasi-judicial activities, i.e., initiating prosecution and presenting the state's case. Id. at 430-31. Plaintiff contends, however, that defendant Farmer's assignment of plaintiff's criminal prosecution to defendants Allsworth and Douglas was not a quasi-judicial act, but rather an administrative act, and therefore, an act for which

he can be held liable. Plaintiff relies on Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981), to support his theory. In Marrero the court held the prosecutor did not enjoy absolute immunity for his alleged participation in an illegal search and seizure. Schoenfield, however, alleges no illegal activity on the part of defendant Farmer. As to defendants Allsworth and Douglas, the only offense alleged by plaintiff appears to be lack of investigative experience. At most, they were negligent in destroying exculpatory evidence.

B. Defendant Deputy Sheriff Rodney Lester

A sheriff only enjoys qualified

immunity from liability under section 1983. Pierson v. Ray, 386 U.S. 547, 557 (1967). Defendant Lester, as a deputy sheriff, enjoys qualified immunity. Lester referred plaintiff's criminal case to the Humboldt County District Attorney in response to charges made by girls in Schoenfield's class. As plaintiff does not allege that defendant's referral was made in bad faith or without probable cause, defendant is immune from liability.

C. Conclusion

For the foregoing reasons, the court grants defendants' motion to dismiss with leave to amend consistent with the terms of this order. An amended complaint shall be filed within twenty (20) days of

the date of this order and defendant shall have twenty (20) days to answer or otherwise respond.

IT IS SO ORDERED.

DATED: SEP 23 1987

/S/
MARILYN HALL PATEL
United States District Judge

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN SCHOENFIELD,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	
	)	NO. 88-1853
THE COUNTY OF HUMBOLDT;	)	
TERRY FARMER; RODNEY	)	DC CV
LESTER; BARBARA ALLSWORTH;	)	87-0244 MHP
SYLVIA DOUGLAS,	)	
	)	
Defendants-Appellees.	)	
	)	

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 22, 1989

FILED
JUL 14 1989
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEAL

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BIRAN SCHOENFIELD, Plaintiff-Appellant,	)	No. 88-1853
v.	)	DC No. CV-87-244-MHP
THE COUNTY OF HUMBOLDT; TERRY FARMER; RODNEY LESTER; BARBARA ALLSWORTH; SYLVIA DOUGLAS, Defendant-Appellant.	)	ORDER

Before: POOLE, BOOCHEVER, and WIGGINS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Poole and Wiggins reject the suggestion for rehearing en banc and Judge Boochever makes no recommendation.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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Attorneys for Plaintiff
BRIAN SCHOENFIELD

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIAN SCHOENFIELD,

Plaintiff,

vs.

COUNTY OF HUMBOLDT, TERRY FARMER, RODNEY LESTER, BARBARA ALLSWORTH, and SYLVIA DOUGLAS,

Defendants.

_____/

No. C 87 0244 MHP

FIRST AMENDED COMPLAINT

FIRST CAUSE OF ACTION

(1) This action arises under the United States Constitution, particularly under the provisions of the Fourteenth Amendment, and under federal law, Title 42, United States Code, Section 1983. This court has jurisdiction of this cause of action under Title 28, United States Code, Section 1343.

(2) Plaintiff BRIAN SCHOENFIELD hereby demands a jury trial of this action.

(3) The matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

(4) Plaintiff BRIAN SCHOENFIELD is, and at all times mentioned herein was, a citizen of the United States and a resident of the County of Humboldt, State of California.

(5) Defendant COUNTY OF HUMBOLDT is a governmental entity within the State of California.

(6) Defendant TERRY FARMER is, and at all times mentioned herein was, the District Attorney for defendant COUNTY OF HUMBOLDT.

(7) Defendant RODNEY LESTER is, and at all times mentioned herein was, a Deputy Sheriff for the COUNTY OF HUMBOLDT.

(8) At all times mentioned herein, defendants BARBARA ALLSWORTH and SYLVIA DOUGLAS were employees or agents of the Humboldt County District Attorney's Office and acting within the course and scope of said employment or agency.

(9) Each and all of the acts of the individual defendants alleged herein were done by defendants under the color and

pretense of the statutes, regulations, customs and usages of the County of Humboldt and State of California, and under the authority of defendants' offices therewith.

(10) On August 29, 1986, plaintiff submitted a claim to defendant COUNTY OF HUMBOLDT regarding this matter. Defendant COUNTY returned said claim, contending it was untimely.

(11) Between October, 1984 and December, 1984, plaintiff BRIAN SCHOENFIELD was a student teacher for the fifth grade class or Morris Elementary School in the McKinleyville School District, State of California.

(12) In December of 1984, certain female members of MR. SCHOENFIELD's class claimed that they had been molested by MR. SCHOENFIELD.

(13) An investigation was commenced by defendant RODNEY LESTER, a deputy sheriff of the Humboldt County Sheriff's department, regarding these claims.

(14) Plaintiff alleges, on information and belief, that defendant LESTER had neither the training, skill nor experience to properly conduct an investigation regarding molestation.

(15) Defendant LESTER referred the investigation to the Humboldt County District Attorney.

(16) Approximately two months after the case was referred to the District Attorney's office, District Attorney TERRY FARMER assigned the investigation of the case to defendants ALLSWORTH and DOUGLAS.

(17) District Attorney TERRY FARMER, because of his position and the

authority granted and delegated to him by the Humboldt County Board of Supervisors, was responsible for determining who would be assigned to investigate a case and the necessary training and experience required to conduct such an investigation.

(18) Neither defendant ALLSWORTH nor defendant DOUGLAS had any training or experience in the investigation of criminal cases. Defendant DOUGLAS was a volunteer investigator for the District Attorney's Office and defendant Allsworth worked as the Director of the Humboldt County Victim/Witness program within the District Attorney's Office. Defendant ALLSWORTH had previously been assigned as child advocate for the children who made the claims of molestation. By virtue of their background and experience, defendants ALLSWORTH and DOUGLAS had a bias or

prejudice against persons charged with an offense of the type plaintiff was charged with. Both defendants ALLSWORTH and DOUGLAS understood that their assignment as investigators was "to get" plaintiff.

(19) Plaintiff is informed and believes, and based thereon alleges, that at the time of this assignment, defendant FARMER was aware of the foregoing.

(20) As a result of the foregoing, defendants LESTER, ALLSWORTH and DOUGLAS conspired to violate the substantive and procedural due process rights of plaintiff SCHOENFIELD by improperly, unfairly and inadequately investigating the claims against plaintiff SCHOENFIELD in that, among other things, defendants destroyed and suppressed exculpatory evidence, failed to record exculpatory testimony of witnesses, and conducted interviews of

witnesses in a biased and suggestive manner, resulting in the suppression of favorable evidence. For example, defendants LESTER, ALLSWORTH and DOUGLAS destroyed audio tapes containing exculpatory testimony by the children and claimed in reports to the District Attorney that the children had described fondling of their pubic areas and breasts when in fact the children had stated that plaintiff had merely patted their knees or shoulders.

(21) As a result of the foregoing, defendants LESTER, ALLSWORTH and DOUGLAS further conspired to improperly, unfairly and inadequately advise the District Attorney's office of the merits of the claims against plaintiff SCHOENFIELD by, among other things, failing to bring to the attention of the District Attorney the identity and testimony of exculpatory

witnesses and drafted misleading and biased synopses of the testimony obtained.

(22) Further, defendants LESTER, ALLSWORTH and DOUGLAS provided information regarding the testimony of witnesses to the District Attorney's office known by defendants to be false.

(23) As a result of the foregoing, criminal charges were brought against MR. SCHOENFIELD in that action entitled "People v. Brian Schoenfield, Arcata Justice Court No. C26062".

(24) On May 29, 1986, a judgment of "not guilty" was entered in the above-entitled criminal action.

(25) The improper prosecution of plaintiff SCHOENFIELD was a foreseeable result of assigning untrained, inexperienced, and prejudiced personnel to inves-

tigate the claims of molestation against him.

(26) The assignment of the investigation to defendants ALLSWORTH and DOUGLAS by defendant FARMER was grossly negligent, with reckless disregard for and deliberate indifference to the consequences of such conduct.

(27) The failure of defendant COUNTY OF HUMBOLDT to properly and adequately train defendants LESTER, ALLSWORTH and DOUGLAS and its delegation of authority to the District Attorney to allow him to retain and assign untrained and inexperienced investigators was so grossly negligent as to reach the level of reckless disregard and deliberate indifference by defendant COUNTY to the constitutional rights of those who might be investigated by those defendants.

(28) The assignment of untrained and prejudiced personnel by defendant TERRY FARMER to investigate the claims against plaintiff SCHOENFIELD constituted an official policy of defendant COUNTY OF HUMBOLDT in that defendant FARMER, as District Attorney, had been specifically delegated the authority to retain and assign investigators.

(29) The conduct of defendants as described above deprived plaintiff of both his procedural and substantive right to not be deprived of property without due process as guaranteed under the Fourteenth Amendment of the Constitution of the United States in that said actions and subsequent prosecution based thereon substantially interfered and interfere with plaintiff's property right to obtain employment in his chosen profession as a

school teacher by causing him to be suspended from the school at which he was employed and by stigmatizing his reputation thereby interfering with his present and future ability to work as a school teacher.

(30) By reason of the conduct of defendants, and each of them, plaintiff SCHOENFIELD was forced to defend himself in the above-entitled criminal action and incurred reasonable attorneys' fees and related expenses in the sum of $90,000.

(31) By reason of the wrongful prosecution of plaintiff SCHOENFIELD, plaintiff SCHOENFIELD was forced to delay his chosen career as a teacher and, because of said prosecution, his ability to proceed with such a career has been irreparably damaged.

(32) By reason of the conduct of

defendants, and each of them, including the wrongful and improper prosecution of plaintiff SCHOENFIELD, plaintiff has suffered great humiliation, shame, inconvenience and mental suffering, all to his damage.

(33) In order to bring this action, plaintiff has been required to obtain attorneys and is entitled to the reasonable expenses therefor.

WHEREFORE, plaintiff prays for damages as hereinafter set forth.

SECOND CAUSE OF ACTION

(34) Plaintiff BRIAN SCHOENFIELD hereby refers to and incorporates herein by reference paragraphs 1 through 33 of his first cause of action.

(35) This cause of action arises under federal law, Title 42, United States Code, Section 1985(2).

(36) Defendants LESTER, ALLSWORTH and DOUGLAS, and each of them, did conspire to hinder, obstruct and defeat the right of BRIAN SCHOENFIELD to receive a fair prosecution and trial with he intent to deny plaintiff SCHOENFIELD equal protection of the laws and to injure him in his property right to obtain employment in his chosen profession as a school teacher.

WHEREFORE, plaintiff prays for damages as hereinafter set forth.

THIRD CAUSE OF ACTION

(37) Plaintiff BRIAN SCHOENFIELD hereby refers to and incorporates herein by reference paragraphs 1 through 33 of his first cause of action.

(38) This cause of action is a State claim over which this court has pendent jurisdiction.

(39) During the course of his investigation of the criminal charges against plaintiff BRIAN SCHOENFIELD, defendant LESTER wrongfully and intentionally destroyed audio tapes which contained exculpatory evidence regarding the molestation charges brought against plaintiff SCHOENFIELD.

(40) As a direct and proximate result of such destruction of evidence, plaintiff SCHOENFIELD was required to obtain an attorney to defend him in the criminal action and incurred attorneys' fees and related expenses in excess of $90,000.

(41) By reason of the conduct of defendant LESTER, plaintiff has suffered great humiliation, shame, inconvenience and mental suffering, all to his damage.

WHEREFORE, plaintiff prays for judg-

ment as hereinafter set forth.

FOURTH CAUSE OF ACTION

(42) Plaintiff hereby refers to and incorporates by reference paragraphs 1 through 33 of his first cause of action and paragraphs 38 through 41 of his third cause of action.

(43) Upon undertaking the investigation of the claims against plaintiff BRIAN SCHOENFIELD, defendants LESTER, ALLSWORTH and DOUGLAS had a duty to properly and diligently investigate said claims.

(44) Defendants LESTER, ALLSWORTH and DOUGLAS breached that duty in that they negligently, incompetently, and inappropriately conducted said investigation and slanted the investigation in favor of the State without regard to the true facts. As a result of such conduct,

plaintiff SCHOENFIELD incurred reasonable attorneys' fees and related expenses in the sum of $90,000 to defend himself against the criminal action brought against him.

(45) By reason of the conduct of defendants LESTER, ALLSWORTH and DOUGLAS, plaintiff has suffered great humiliation, shame, inconvenience and mental suffering, all to his damage.

WHEREFORE, plaintiff prays for judgment as follows:

(1) General damages in the sum of $2,000,000;

(2) The reasonable costs and expenses of this action, including attorneys' fees;

(3) As against defendant COUNTY only, deterrent and exemplary damages in the sum of $3,000,000 as authorized by

Roman v. City of Richmond, 570 F.Supp. 1554 (1983); and

(4) Such other and further relief as may be just.

JANSSEN, MALLOY, MARCHI & NEEDHAM

By /S/
CLAYTON R. JANSSEN
Attorneys for Plaintiff
BRIAN SCHOENFIELD

CALIFORNIA PENAL CODE

§830.1 Designation of Peace Officers -- Scope of Authority.

"(a) Any sheriff, undersheriff, or deputy sheriff, regularly employed and paid as such, of a county . . . or any inspector or investigator regularly employed and paid as such in the office of a district attorney, is a peace officer . . . "

§832. Peace Officer Training Requirements.

(a) Every person described in this chpter as a peace officer, shall satisfactorily complete an introductory course of training prescribed by the Commission of Peace Officer Standards and Training. . . ."

PROOF OF SERVICE BY MAIL

Proof of service of this Petition for Certiorari will be filed with the clerk in a separate document.

No. 89-616

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BRIAN SCHOENFIELD,
Petitioner,

VS.

COUNTY OF HUMBOLDT, TERRY FARMER, RODNEY LESTER, BARBARA ALLSWORTH, and SYLVIA DOUGLAS
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION(S) PRESENTED

As disussed below, the Petition For Writ Of Certioari should be denied because, contrary to what is represented in the petition, the decision of the United States Court of Appeals for the Ninth Circuit in this case is in accord with the decisional law of virtually every other Circuit. It stands for the fundamental notion that absent a deprivation that implicates federally guaranteed rights, a claim simply asserting the common law elements of the tort of malicious prosecution is not actionable under 42 U.S.C. Section 1983.

The sole question then presented by this case is:

> Whether this Court should expand the scope of liability under 42 U.S.C. Section 1983 to embrace the common law tort of malicious prosecution if the alleged tortfeasor acts under color of state law but no federally protected right is implicated?

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No. 89-616

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, County of Humboldt, Terry Farmer, Rodney Lester, Barbara Allsworth and Sylvia Douglas, respectfully submit this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Respondents do not dispute that petitioner is entitled to have this Court treat all allegations of his complaint as true because this matter was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) following his unsuccessful attempt to amend the complaint to implicate some federally protected right.

The Amended Complaint

Allegations not recited in the petition include:

> Between October, 1984, and December, 1984, petitioner was a student teacher at Morris Elementary School. [A 52.][1] Certain female members of the fifth grade class in which he taught claimed that he molested them. [A 52.] The prosecution of petitioner for these alleged crimes was unsuccessful. [A 57.]

What Is Not Alleged

Even more significant is what is not alleged in the complaint:

> Absent is any allegation that any respondent had any contact with petitioner before the children lodged their complaints. Absent is any allegation that the arrest of petitioner was one made without probable cause or otherwise tainted in any way by the conduct of any respondent. Absent is any allegation that the loss or destruction of evidence affected the ability of petitioner to conduct his defense at trial. Absent is any allegation that this evidence was not otherwise available to petitioner. Absent is any allegation that any evidence was gathered in a manner violative of petitioner's Fourth or Fifth Amendment rights.[2] [A 49-66.]
>
> Absent is any allegation that there were any "pre-trial restraints" on petitioner's liberty, "other than the condition that [petitioner] appear for trial" following his arrest for probable cause based upon the unsolicited charges of molestation lodged by the female children he taught.[3]

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[1] References to the appendix are to that appearing as a portion of the Petition For Writ of Certiorari submitted by petitioner.

[2] This illustrates the absurdity of the "examples" (stomach pumping and blackmailing of trial witnesses) offered by petitioner as these bear no relation to the facts alleged in the amended complaint. (See Petition, p. 14.)

[3] As noted in the opinion of the Ninth Circuit panel, with this factual pattern, its determination that no federally protected interest is impli-

ARGUMENT

I

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE NINTH CIRCUIT IN THIS CASE AND THOSE OF OTHER CIRCUITS BECAUSE NO COURT HAS HELD PROSECUTION RESULTING FROM ERRORS DURING THE INTERMEDIATE INVESTIGATION PHASE, PRECEDED BY AN ARREST FOR PROBABLE CAUSE UNTAINTED BY THE INVOLVMENT OF STATE AGENTS AND FOLLOWED BY A FAIR TRIAL IS ACTIONABLE UNDER 42 U.S.C. SECTION 1983

Disregarding momentarily the unique factual pattern of this case, it may be seen that petitioner has greatly overstated the purported conflict between the decision of the Ninth Circuit in this case and that of other Circuits. As the Court below observed (A 8-9), its view that malicious prosecution is not actionable under 42 U.S.C. Section 1983, absent a violation of a federally protected right, is in accord with that of virtually every other Circuit.[4]

Interestingly, the Fifth Circuit, considered by the Ninth Circuit to be the only one truly at variance, recently clarified that its position was *not* that malicious prosecution by state officials was sufficient to give rise to a civil rights claim:

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cated under these circumstances is supported by the decision of this Court in the case of *Gerstein v. Pugh*, 420 U.S. 103 (1975). [See A 11-12.]

[4] Reference is made by the court below to the Annotation, *Actionability of Malicious Prosecution Under 42 USCS § 1983*, 79 A.L.R. Fed. 896, 902-03 (1986). Only the Fifth Circuit has squarely held to the contrary. It should be noted, however, that its decision in *Wheeler v. Cosden Oil & Chemical*, 734 F.2d 254, 257-60 (5th Cir. 1984), *modified on other grounds*, 744 F.2d 1131 (5th Cir. 1984), did *not* involve an initial arrest for probable cause untainted by the act of state agents. Rather, the arrest itself was a "set-up" in which a state agent participated.

> "In recognizing that cases in this Circuit have held that illegal arrest and bad faith prosecution by public officials acting under color of state law may rise to the level of a constitutional violation, *we need not decide, do not hold and do not mean to intimate, that the rights secured by the Constitution are precisely coextensive with the common law torts of false arrest and malicious prosecution.*" (*Hand v. Gary* 838 F.2d 1420, 1424 fn.3 (5th Cir. 1988), emphasis added.)

We find then the one Circuit potentially in conflict with the decision of the Ninth Circuit in this case "clarifying"—if not rethinking—its position to bring it more in accord with that of all other Circuits. It bears reiteration that the Fifth Circuit has not been called upon to decide a case such as this in which the state actors do not participate in any manner in soliciting the initial complaint and the arrest is one based on probable cause.[5]

II

THE NINTH CIRCUIT PROPERLY CONCLUDED THAT PETITIONER'S FIRST AMENDED COMPLAINT DID NOT STATE A CLAIM ACTIONABLE UNDER 42 U.S.C. SECTION 1983 BECAUSE NO DEPRIVATION OF A FEDERALLY PROTECTED RIGHT IS ALLEGED

It has been seen that neither the propriety of petitioner's arrest nor the intrinsic fairness of his trial are challenged in the First Amended Complaint. Rather, the gravamen of petitioner's complaint is that he sustained damage because he was prosecuted—i.e., *because the trial occurred.* Central to his theory of the case is the notion that the Constitution permits only the guilty to be prosecuted or that "due process" requires that innocence be determined between the time of arrest and trial. This is simply not the law.

---

[5] The Ninth Circuit has had little difficulty finding maliciously motivated prosecution actionable under 42 U.S.C. §1983 when there is a violation of the equal protection clause or some other federally protected interest. (See for example *Bretz v. Kelman* 773 F.2d 1026, 1031 (9th Cir. 1985) and *Cline v. Brusett,* 661 F.2d 108, 112 (9th Cir. 1981).)

Petitioner's effort to fill this void by allegations of destruction of exculpatory evidence fails to implicate an interest of constitutional magnitude. To the contrary, in the case of *California v Trombetta*, 467 U.S. 479, 81 L.Ed.2d 413 104 S.Ct. 2528 (1984), this Court held that for the destruction of evidence to be of "constitutional materiality" (i.e., violative of the due process clause) the,

> "... evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (476 U.S. 489.)

With liberal interpretation the First Amended Complaint may be construed as including allegations satisfying the first prong of this test. There is, however, *no allegation* that petitioner was unable to obtain "comparable" exculpatory evidence—or precisely the same evidence—by testimony at trial.

Futher, investigative errors after an arrest for probable cause are *not* alone sufficient to implicate constitutionally protected rights. In the case of *Baker v. McCollan*, 443 U.S. 137, 61 L.Ed.2d 433, 99 S.Ct. 2689 (1979), Baker complained of incarceration that occurred because of mistaken identification. His brother, using a duplicate of Baker's driver's license which bore his picture, was arrested and released on bail. Later an arrest warrant issued which was intended for his brother. Baker was stopped for a traffic violation and a routine warrant check revealed that a person of his name was wanted in the county of the original arrest. He protested that the case was one of mistaken identity but was held in custody for several days before the error was confirmed. This Court concludes that, while Baker's complaint may state a claim for false imprisonment under state law against the sheriff who failed to implement proper procedures to discover the error in identity, no constitutional violation was involved if the arrest was based upon probable cause:

> "The constitution does not guarantee that only the guilty will be arrested. If it did, section 1983 wold provide a cause of

> action for every defendant acquitted—indeed, for every suspect released.
>
> "We do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim. The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury." (443 U.S. 137, 145-6.)

The facts of this case are less compelling. Unlike Baker, petitioner was not incarcerated and suffered no loss of liberty. [A 49-66.]

Along these same lines, the Ninth Circuit properly concluded that petitioner suffered no deprivation of a property right beyond that which may be reasonably expected to flow from his arrest for probable cause. On this point, the opinion below reads:

> "Schoenfield's defense costs are harms of the type that would be incurred in any prosecution, and are not a cognizable deprivation of property for due process purposes. The harm to his career that resulted from the stigma of being accused of child molestation is not a cognizable deprivation of liberty or property for due process purposes. See *Paul v. Davis*,424 U.S. 693, 701-12 (1976). Because no deprivation of a federally protected right occurred, Schoenfield's remedy, if any, must be in state court." [A 10-11.]

Based upon the foregoing, it is respectfully submitted that the more difficult questions of whether better trained and less zealous investigators would have retained the tapes of interviews of children who did *not* assert that they were molested or might have more astutely determined whether the span of an adult, male hand on the shoulder of a nine or ten year old, fifth grade girl reached her breast or whether the same adult, male hand placed upon her knee reached the pubic area, need not be answered. The Ninth Circuit properly concluded that, in light of an arrest for

probable cause based upon the complaints of these non-party, young girls, investigative errors by "inadequately trained" and "biased" personnel resulting in prosecution of the case but which did not affect petitioner's ability to obtain a fair trial, may give rise to a common law tort claim for malicious prosecution—but will not support an action predicated upon 42 U.S.C. Section 1983.

A contrary determination would mean that every criminal defendant afforded a fair trial after an arrest for probable cause would be invited to seek compensation under 42 U.S.C. Section 1983 by seizing upon any imperfection in the investigative stage and attributing it to inadequate training and bias. In effect, a decision contrary to that of the Ninth Circuit would serve notice on all prosecutors and their staffs that prosecution of any case in which a guilty verdict is not guaranteed will raise the spector of imposition of liability under 42 U.S.C. Section 1983.

CONCLUSION

The Court of Appeals for the Ninth Circuit properly construed petitioner's First Amended Complaint as alleging the common law tort of malicious prosecution, without implication of any federally protected right, and correctly concluded that no claim was stated under 42 U.S.C. Section 1983. Whether a theoretical conflict exists between the Fifth Circuit and all others, including the Ninth Circuit, is unimportant for present purposes because no court has found 42 U.S.C. Section 1983 to be expansive enough to embrace the alleged factual pattern of this case. The petition should be denied.

Respectfully submitted,

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